

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

September 20, 2006 Session

**IN RE: ESTATE OF HAROLD N. WALKER, DECEASED
WADE WALKER v. RUBY WALKER**

**Appeal from the Chancery Court for Knox County
No. 03-61423-3 Sharon J. Bell, Chancellor**

Filed November 22, 2006

No. E2006-00157-COA-R3-CV

In 1988, Harold N. Walker and his wife, Ruby Walker, executed separate wills. Harold N. Walker died in December of 2002, and his will was admitted to probate. Letters Testamentary were issued naming Wade Walker Personal Representative of the Estate of Harold N. Walker (“Plaintiff”). Ruby Walker filed a petition seeking, among other things, exempt property, spousal support, and an elective share of the Estate of Harold N. Walker (“the Estate”). Randy A. Walker, Harold N. Walker’s son and a beneficiary under the will of Harold N. Walker, answered Ruby Walker’s petition claiming, in part, that Harold N. Walker and Ruby Walker had executed mutual wills that constituted a contract under which Ruby Walker had waived her right to seek exempt property, spousal support, and an elective share of the Estate. Plaintiff then sued Ruby Walker and Randy Walker¹ seeking, among other things, a determination of whether Ruby Walker had waived all right, claim, and interest to the Estate. After a trial, the Trial Court entered an order finding and holding, *inter alia*, that no clear and convincing evidence was presented that Harold N. Walker and Ruby Walker had entered into a contract wherein Ruby Walker had given up her right to dissent from her husband’s will. Plaintiff appeals. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed;
Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Johnny V. Dunaway, LaFollette, Tennessee for the Appellant, Wade Walker.

Wanda G. Sobieski and Diane M. Messer, Knoxville, Tennessee for the Appellee, Ruby Walker.

¹Randy Walker is not involved in this appeal.

OPINION

Background

Harold N. Walker and Ruby Walker were married in August of 1984, and remained married until the death of Harold N. Walker in December of 2002. No children were born of this marriage, but each party had children from a previous marriage.

On April 25, 1988, Harold N. Walker executed a will that provided, in pertinent part:

I bequeath to my wife, Ruby Walker, a life estate in my interest in the float boat and the motor home presently owned by us and a life estate in any motor vehicle owned by me at the time of my death or if owned by us jointly then a life estate in my interest therein with the power to sell said property within her sole discretion. That in the event my wife does sell the above described property then that portion of the proceeds which represents my interest therein shall be distributed to my sons, Randy and Rodney Walker, in equal shares. In the event that either or both of them predeceases or dies simultaneously with me I bequeath that child's share to his children per stirpes and not per capita.

I bequeath any interest I may have in the household furnishings in the house where my wife Ruby Walker and I live to my wife, Ruby Walker. In the event my said wife does not survive me, I bequeath said property to her son, Wendall Shoemaker. In the event he does not survive me, I bequeath said property to his children living at the time of my death.

I bequeath all the rest of personal property not otherwise specifically bequeathed except cash on hand or on deposit owned by me at the time of my death to my sons, Randy and Rodney Walker, in shares considered to be equal by my executor. In the event that either or both of them predeceases me or dies simultaneously with me then I bequeath that child's share to his children per stripes and not per capita.

ARTICLE IV

It is the intention of my wife, Ruby, and myself that each of us leave our respective estates to our children. I hereby renounce any interest in the residence which is being constructed for us at 11401 Freels Bend Point on Melton Hill Lake, except that it is my understanding that my wife will leave me a life estate in the premises in the event that she predeceases me which I do not renounce; said life estate in the property is expected to be terminable upon my death, remarriage or vacating of the premises.

On July 15, 1988, Ruby Walker executed a will that provided, in pertinent part:

My husband and I are currently building a house at 11401 Freels Bend Point on Melton Hill Lake. If I should predecease my husband, then I give, devise and bequeath to him the right to live in said house until the earlier of his death, remarriage or ceasing for any reason to reside in said house. It is the mutual desire of my husband and myself to leave our respective estates to our families by prior marriages. Upon the death, remarriage or ceasing to reside on the Freels Bend Point premises by my husband, I give, devise and bequeath said property, in fee, to my son, Wendell Howard Shoemaker.

On December 15, 1992, Harold N. Walker executed a Quit Claim Deed to Ruby Walker for Lot 11 in the Morgan Place Subdivision, the same property referenced in the wills of Harold N. Walker and Ruby Walker as 11401 Freels Bend Point. The Quit Claim Deed stated, in pertinent part:

[Harold N. Walker] HEREIN, in making this conveyance, intends to convey all his right, title and interest, including homestead, or any other interest relating to his marital status, including the right to dissent from [Ruby Walker's] Last Will and Testament, or to claim any elective share he may have regarding her estate, [Harold N. Walker] relying solely upon the terms of the Last Will and Testament of [Ruby Walker] for whatever rights or interests he may have, in this property. This instrument is being executed and recorded pursuant to a verbal understanding between [Harold N. Walker] and [Ruby Walker], as to their separate property interests.

Harold N. Walker died in December of 2002, at the age of 84, and his April 25, 1988 will was admitted to probate. Ruby Walker filed a petition seeking, among other things, exempt property, spousal support, and an elective share of the Estate. Randy A. Walker, Harold N. Walker's son and a beneficiary under the will of Harold N. Walker, answered Ruby Walker's petition claiming that Harold N. Walker and Ruby Walker had executed mutual wills that constituted a contract under which Ruby Walker had waived her right to seek exempt property, spousal support, and an elective share of the Estate. Plaintiff then sued Ruby Walker and Randy Walker seeking, among other things, a determination of whether Ruby Walker had waived all right, claim, and interest to the Estate.

The case was heard by the Clerk and Master in February of 2005. At that time, Ruby Walker was 86 years old. A Master's Report was entered on February 28, 2005, finding that "[Harold N. Walker] and [Ruby Walker] did not enter into a contract to make mutual and reciprocal wills or that they agreed that their wills could not be modified or that the surviving spouse would be prevented from dissenting from the will to seek special spousal allowances."

Plaintiff filed an exception to the Master's Report and a trial was held before the Trial Court. The Trial Court entered an order on December 15, 2005, confirming the Master's Report in its entirety and finding and holding, *inter alia*:

1. The Quitclaim Deed (Exhibit 3) did not set forth any intent by the surviving spouse to give up her right to dissent from decedent's will.
2. The [Trial Court] cannot find by the preponderance of the evidence, much less clear and convincing evidence, that the recordation of the Quitclaim Deed constituted an acceptance of an offer by decedent, even if the Quitclaim Deed were to be construed as evidence of the surviving spouse's intent to give up her right to dissent from decedent's will.

Plaintiff appeals to this Court.

Discussion

Although not stated exactly as such, Plaintiff raises one issue on appeal: whether the Trial Court erred in finding that Harold Walker and Ruby Walker did not execute mutual and reciprocal wills constituting a contract which would preclude Ruby Walker from seeking exempt property, spousal support, and an elective share of the Estate.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

"Mutual wills are separate wills of two persons which are reciprocal in their provisions." *In Re: Estate of J.T. Hurdle*, 868 S.W.2d 627, 629 (Tenn. Ct. App. 1993). As this Court stated in *In Re: Estate of J.T. Hurdle*:

Generally, a will is ambulatory and revocable during a person's lifetime. Parties may, however, contract with each other to limit future testamentary distribution of property by the survivor. In such a case, the will of the first party to die is the will of both parties and the will of the last party to die is ineffective.

Id. at 628. To be more precise: "It is the contract to dispose of property in accordance with the terms of the will that becomes irrevocable at the death of the first testator," not the actual will itself. *In Re: Estate of Hillary R. Sanders*, No. E2001-00946-COA-R9-CV, 2002 Tenn. App. LEXIS 144, at *12 (Tenn. Ct. App. Feb. 25, 2002), *no appl. perm. appeal filed*.

Our Legislature enacted Tenn. Code Ann. § 32-3-107, which, as our Supreme Court has noted, "prescribes exclusive methods by which a contract to make a will, to revoke a will or to

die intestate may be established.” *Junot v. Estate of Emma Jane Gilliam*, 759 S.W.2d 654, 658 (Tenn. 1988). “The evidence to establish a contract not to revoke a will must be clear and convincing.” *Id.* at 657.

Tennessee Code Annotated § 32-3-107 provides:

32-3-107. Contracts to make or revoke wills. – (a) A contract to make a will or devise, or not to revoke a will or devise, or to die intestate can be established only by:

- (1) Provisions of a will stating material provisions of the contract;
- (2) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or
- (3) A writing signed by the decedent evidencing the contract.

(b) The execution of a joint will or mutual wills does not create a presumption of a contract to make a will, or to refrain from revoking a will.

Tenn. Code Ann. § 32-3-107 (2001).

In the case now before us, Plaintiff argues, in part, that the evidence establishes a contract under Tenn. Code Ann. § 32-3-107(a)(1). However, a review of the record reveals that Plaintiff conceded at trial that he was proceeding only under Tenn. Code Ann. § 32-3-107(a)(3). We quote from the trial transcript the colloquy between the Trial Court and Plaintiff’s counsel, Mr. Dunaway.

MR. DUNAWAY: The Troutman Act which is codified at 32-2-107, gives us the parameters in which a contract can be made to revoke or to not revoke a Will. One of those would be provisions of a Will stating material provisions of a contract.

THE COURT: What does that mean?

MR. DUNAWAY: That would be stating that in consideration of A, I’m going to do B. Another part of the Troutman Act says that you can have this with an express reference in the Will to a contract. Now, if you’ll look at this language, there is not this express reference to the contract. It doesn’t say this is a contract. It doesn’t have that - -

THE COURT: In your case, in this case?

MR. DUNAWAY: In this case. Then the third thing is, a writing signed by the decedent evidencing the contract. In our case we have that writing signed by the decedent evidencing the contract which is the Quit Claim Deed. My position, Your Honor, would be that I would have a very difficult time maintaining this

position under the Troutman Act because there's not express language of the contract but for the fact that we have this third instrument.

THE COURT: So you don't have anything, and I assume in the Wills, but correct me if I'm wrong, under the first scenario you would have Wills which actually said in consideration of something, et cetera, you don't have that?

MR. DUNAWAY: No, we don't have that language.

THE COURT: Number two, you would have in your Will the reference to a contract.

MR. DUNAWAY: That is correct.

THE COURT: Which was separately set out or contained in the Will?

MR. DUNAWAY: It would be contained in the Will itself.

THE COURT: We don't have that.

MR. DUNAWAY: We don't have that.

THE COURT: So if we have something, it's a writing signed by the defendant - -

MR. DUNAWAY: By the decedent.

THE COURT: By decedent, excuse me, which evidences the contract not to revoke or dissent from the Will?

MR. DUNAWAY: Yes, your Honor.

“Nothing is better settled than that a ‘plaintiff in error will not be permitted to take advantage of errors which he himself committed, or invited, or induced the trial Court to commit, or which were the natural consequence of his own neglect or misconduct.’” *Gentry v. Betty Lou Bakeries*, 100 S.W.2d 230, 231 (Tenn. 1937) (quoting 4 C.J., p. 700). Plaintiff made it clear at trial that he was proceeding solely under Tenn. Code Ann. § 32-3-107(a)(3) and expressly waived issues involving Tenn. Code Ann. §§ 32-3-107(a)(1) and (a)(2). Issues regarding Tenn. Code Ann. §§ 32-3-107(a)(1) and (a)(2) were not tried and were not addressed by the Trial Court, correctly so, in its December 15, 2005 order. Plaintiff cannot now claim on appeal that he should have won under Tenn. Code Ann. §§ 32-3-107(a)(1) or (a)(2). We, therefore, will not address Plaintiff's arguments regarding Tenn. Code Ann. §§ 32-3-107(a)(1) and (a)(2).

We turn to Plaintiff's argument regarding Tenn. Code Ann. § 32-3-107(a)(3). Plaintiff argues that the evidence in this case establishes a contract under Tenn. Code Ann. § 32-3-107(a)(3) because:

The Quit Claim Deed executed by Harold Walker and recorded by Ruby Walker constitutes a separate writing evidencing the contract between himself and Appellee. In it, Harold Walker states that he is giving up all rights he may have as a result of his marital status including homestead, the right to dissent, elective share, etc., pursuant to a verbal contract between himself and Mrs. Walker.... Thus, the Quit Claim Deed is a separate writing signed by the Decedent evidencing a contract between himself and Appellee to make mutual, irrevocable Wills.

Plaintiff cites to *Davenport v. Goddard* in support of this argument. *Davenport v. Goddard*, No. 03A01-9601-CH-00006, 1996 Tenn. App. LEXIS 236 (Tenn. Ct. App. April 24, 1996), *no appl. perm. appeal filed*. In *Davenport*, husband and wife, Joe and Dell Susong, executed separate wills and then both executed a third document that set out the Susongs' agreement that all of their real and personal property would pass to the survivor and detailed what would happen to said property when both parties had died. *Id.* at *1-2.

The case now before us is distinguishable from *Davenport* because both spouses in *Davenport* executed the separate document that was used to prove a contract. *Id.* at *2. In the case now before us, Ruby Walker did not execute the Quit Claim Deed. The fact that the Quit Claim Deed was recorded is insufficient to prove that Ruby Walker accepted any offer to contract that Harold N. Walker may have made via the Quit Claim Deed by which she agreed to give up her right to dissent from Harold N. Walker's will.

The Trial Court specifically found and held that "[t]he Quitclaim Deed ... did not set forth any intent by the surviving spouse to give up her right to dissent from decedent's will." The Quit Claim Deed provided that Harold N. Walker conveyed to Ruby Walker "all his right, title and interest, including homestead, or any other interest relating to his marital status, including the right to dissent from [Ruby Walker's] Last Will and Testament, or to claim any elective share he may have regarding her estate, ..." and relied solely upon Ruby Walker's will for any interest he might have in the 11401 Freels Bend Point property. However, the Quit Claim Deed does not state that Ruby Walker is giving up her right to dissent or claim an elective share of Harold N. Walker's estate.

Although the Quit Claim Deed states that Harold N. Walker relied solely upon Ruby Walker's will for any interest he might have in the 11401 Freels Bend Point property, the deed does not reference a specific will made by Ruby Walker, nor does it contain any provisions that would make a preexisting will irrevocable. Although the Quit Claim Deed states that it was "executed and recorded pursuant to a verbal understanding between [Harold N. Walker] and [Ruby Walker], as to their separate property," the only understanding documented is that Harold N. Walker was giving up his right to dissent and claim an elective share of Ruby Walker's estate and was relying solely upon the will of Ruby Walker for any rights he might have in the subject property. Ostensibly,

Harold N. Walker gave up his rights as to Ruby Walker's estate in exchange for Ruby Walker's promise to grant Harold N. Walker a life estate in the 11401 Freels Bend Point property should she predecease him.

We find and hold, as did the Trial Court, that the Quit Claim Deed executed by Harold N. Walker is not clear and convincing evidence sufficient to establish under Tenn. Code Ann. § 32-3-107(a)(3) that Harold N. Walker and Ruby Walker had a contract regarding their wills. We, therefore, affirm the Trial Court's December 15, 2005 order.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, Wade Walker, and his surety.

D. MICHAEL SWINEY, JUDGE